MAHLON FORD BEACH (SUPPLIANT) ..... } APPELLANT;

AND

HIS MAJESTY THE KING (RESPONDENT) ..... } RESPONDENT.

1905
*Nov. 27.

1906
*Feb. 21.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Lease—Canal—Water-power — Improvements on canal—Temporary stoppage of power—Compensation—Total stoppage—Measure of damages—Loss of profits.

A mill was operated by water-power taken from the surplus water of the Galops Canal under a lease from the Crown. The lease provided that in case of a temporary stoppage in the supply caused by repairs or alterations in the canal system the lessee would not be entitled to compensation unless the same continued for six months, and then only to an abatement of rent.

Held, Idington J. *dubitante,* that a stoppage of the supply for two whole seasons necessarily and *bonâ fide* caused by alterations in the system was a temporary stoppage under this provision.

The lease also provided that, in case the flow of surplus water should at any time be required for the use of the canal or any public purpose whatever, the Crown could, on giving notice to the lessee, cancel the lease in which case the lessee should be entitled to be paid the value of all the buildings and fixtures thereon belonging to him with ten per cent. added thereto. The Crown unwatered the canal in order to execute works for its enlargement and improvement, contemplating at the time only a temporary stoppage of the supply of water to the lessee, but later changes were made in the proposed work which caused a total stoppage and the lessee, by petition of right, claimed damages.

Held, Girouard J. dissenting, that as the Crown had not given notice of its intention to cancel the lease the lessee was not entitled to the damages provided for in case of cancellation.

Held, also, that the lessee was not entitled to damages for loss of profits during the time his mill was idle owing to the water being out of the canal.

Judgment of the Exchequer Court (9 Ex. C.R. 287) affirmed, Girouard and Idington JJ. dissenting.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

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APPEAL from a judgment of the Exchequer Court of Canada (1) allowing the suppliant $20,000 damages for loss of water-power formerly supplied under lease from the Crown.

The suppliant was the assignee of a lease of land near the canal known as the "Galops Canal." The lease is dated the 16th December, 1871, and was assigned to the suppliant in 1883. It was made for a term of twenty-one years, renewable in perpetuity for like terms, subject, at the termination of each term, to a revision of the yearly rent, and constituted a demise of a portion of the canal reserve on which the suppliant erected a flour mill. With the lands demised was granted the use and enjoyment of so much of the surplus water of the canal as should be sufficient to drive and propel, by means of the most approved description of wheel, four runs or ordinary mill-stones equal to ten horse-power for each run. The water was supplied from the canal at a point above what was known as Lock number 25, and was carried to the mill by a flume or raceway constructed by the lessee at his own expense.

Provision was made by the lease for interruption to the supply as follows:

"Secondly.—That in the event of the temporary stoppage of the flow or supply of surplus water, or a portion thereof, hereby leased, by reason of the same being required for the navigation of the said canal, or by reason of repairs, improvements, or alterations being, by the said minister or his successors in office, or his officers in that behalf, deemed necessary or desirable to be made to the same, or for the purpose of preventing damage to the said canal, by means of

(1) 9 Ex. C.R. 287.

extreme high water, or by frost or ice, or any other uncontrollable cause or accident, no abatement of rent shall be claimed or allowed, nor the said lessees, their heirs, executors, administrators or assigns, have or pretend to have any right to any compensation whatever, on account of the injury or damage that such stoppage of the flow or supply of surplus water may occasion—save and except only in the event of the total stoppage of the said flow or supply of surplus water for and during an uninterrupted period of six calendar months, during the usual navigation season, in which case the said lessees, their heirs, executors, administrators, and assigns, shall be allowed and obtain, in full compensation for the same, and for any loss or damage that they may thereby sustain, an abatement of six calendar months' rent accruing for any and every such period of continuous interruption in the flow or supply of surplus water hereby leased as aforesaid."

Power was also reserved by the said lease to the Minister of Public Works, on behalf of the Crown, to determine the lease of the said lot and flow of surplus water, or any part thereof, on reasonable notice, namely:

"Provided always, that if at any time hereafter it shall be determined by the said Minister of Public Works, or his successors in office, that the said lot and flow of surplus water, or any part thereof, are or is required for the use of the said canal, or for any public purpose whatever, thereupon, on reasonable notice (of not less than three calendar months) being given to the said lessees, their heirs, executors, administrators or assigns, by the said minister or his successors, to that effect, this lease or the lease for the term then current, and all matters herein or therein contained,

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shall cease and be void, and the said minister, or his successors in office, shall pay or cause to be paid unto the said lessees, their heirs, executors, administrators or assigns, the then value (with an addition of ten per cent. thereon), of all the buildings and fixtures that shall be thereon erected and belonging to the said lessees, their heirs, executors, administrators and assigns, according to a valuation thereof to be made by arbitrators, one of whom to be chosen by the said minister or his successors as aforesaid, another by the said lessees, their heirs, executors, administrators or assigns, and the third by the said arbitrators so nominated as aforesaid before entering on their said arbitration, and the decision of the said arbitrators, or of a majority of them, shall be final."

In 1898 the Minister of Railways and Canals projected certain works for the enlargement and improvement of the canal upon which the appellant's mill was situated, and these works involved, in the immediate vicinity of the appellant's mill, the construction of what was practically a new canal prism, replacing a portion of the old canal prism from which the power from the surplus water had been supplied under the lease of 1871.

On the 12th December, 1898, the old canal, at the point from which the power of the appellant's mill was taken by his flume from the canal to his mill premises, was unwatered to facilitate the construction of the projected works, the unwatering being done by the contractors employed by the minister for the construction of the projected works. The result of the unwatering was, of course, to shut off completely the power from the appellant's mill.

It was not immediately apparent that the stoppage was to be permanent, and it would seem likely that

the old supply might have been resumed, after the completion of the projected works, but for an alteration in the character and scope of these works determined upon after the date of the unwatering. In the result the works as constructed were quite incompatible with a continuance of the supply of power, subject of the demise, the appellant's flume and raceway being destroyed and his mill being completely deprived of the supply of water granted by the lease of 1871.

Much negotiation took place between the appellant and the minister and those representing him during the progress of the work, the appellant being desirous, from the time when it became apparent that the construction of the new works would take away his old supply of power, of obtaining from the Crown a lease or grant of such power as might be developed from the new works, having in view the establishment of an electric power plant for commercial purposes, as an incident of which his mill might have been supplied with electric power.

As the result of these negotiations the appellant finally obtained a lease of power from the surplus water passing through the new works to the extent of 200 horse power, this lease, however, as has been determined by the learned judge, not affecting in any way the assertion of his rights under the old lease.

The petition of right presented by the appellant was based upon the obligation of the Crown created by the demise of 1871, in respect of the supply of water, subject to that demise. It was not disputed on behalf of the Crown that the appellant was entitled to damages, but the measure and extent of those damages was contested.

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Shepley K.C. and *Hilliard,* for the appellant.
Chrysler K.C. for the respondent.

THE CHIEF JUSTICE.—I am of opinion that the appeal should be dismissed with costs.

GIROUARD J. (dissenting).—I think that the last paragraph of clause 6 of the lease disposes of this case. It says:

> Provided always, that if at any time hereafter it shall be determined by the said Minister of Public Works or his successors in office, that the said lot and flow of surplus water, or any part thereof, are or is required for the use of the said canal, or for any public purpose whatever, thereupon, on reasonable notice (of not less than three calendar months), being given to the said lessees, their heirs, executors, administrators or assigns, by the said minister or his successors to that effect, this lease, or the lease for the term then current, and all matters herein or therein contained, shall cease and be void, and the said minister or his successors in office shall pay or cause to be paid unto the said lessees, their heirs, executors, administrators or assigns, the then value (with an addition of ten per cent. thereon) of all the buildings and fixtures that shall be thereon erected and belonging to the said lessees, their heirs, executors, administrators or assigns, according to a valuation thereof to be made by arbitrators one of whom to be chosen by the said minister or his successors as aforesaid, another by the said lessees, their heirs, executors, administrators or assigns, and the third by the said arbitrators so nominated as aforesaid before entering on their said arbitration, and the decision of the said arbitrators, or of a majority of them, shall be final.

It is contended that this clause was introduced into the lease in the interest of the Crown to secure the right to resume possession of the leased premises on giving notice to the tenant. This is true, but only in a limited sense. Suppose the Crown resumes possession of the whole property leased without giving notice. Undoubtedly in such a case the tenant would be entitled to full indemnity as provided in that clause, the notice required being presumed to have

been waived. How a different rule can be applied in the case of only partial possession is more than I can understand, as the clause puts partial eviction upon the basis of a total one. The clause is in the interest of both parties.

It is admitted that the minister determined that the flow of surplus water in question in this cause was required for the use of the canal, or at least for a public purpose. Then, if I understand the case well, the above clause of the lease comes in and provides for the termination of the same and for the payment of the indemnity due to the lessee. I cannot understand how the Crown by its own default can avoid this consequence, namely, by not giving the notice of three months mentioned in the clause, a notice which evidently was required more in the interest of the lessee than of the lessor. I cannot see how the Crown can prevent the lessee from recovering the value of his buildings and fixtures. Mr. Chrysler K.C. has conceded that that value was about $45,000, and I am not prepared to say that the estimation of $50,000 made by the appellant is exaggerated. I am, therefore, of opinion that the appellant should get this value, plus 10 per cent. and interest thereon since the supply of water was stopped, namely, since the 12th December, 1898, and all costs, and that this action should be dismissed as to any other claims or damages.

It has been objected that the action as brought does not justify this conclusion. To avoid future litigation and render full justice to both parties I would permit an amendment, if necessary, to the statement of claim in the terms of the reply of the suppliant. The respondent cannot allege that he is taken by surprise, or even that he is injured. In his statement of defence

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he sets up the above paragraph of the lease and prays

> that the damage should be determined on the provisions of the said lease above recited in reference to the determination of the lease, and that the said lease should be cancelled.

I think this prayer of the statement of defence should be granted on payment of the damages as stipulated in the lease, and established in the case, namely, the value of the buildings and fixtures, plus 10 per cent. thereon. I have the less hesitation in coming to this conclusion, which seems to me to be fair and just between the parties, that the suppliant in his reply to the statement of defence finally says,

> that he has always been and still is ready and willing, and he hereby offers to agree that, without prejudice to his claim for recovery of damages herein and not in any way waiving the same, the said lease be now cancelled on the suppliant being paid the value of the said buildings and fixtures to be ascertained by arbitration in accordance with the provisions of the said instrument.

As to the above reservation made by the appellant of his claim for recovery of damages beyond the value of the said buildings and fixtures and 10 per cent., I believe that he cannot set up any such claim. The question is not what profits the suppliant has lost, but whether he has been permanently deprived of his water-power. There is no doubt as to this and he can claim no larger indemnity than is provided for in the contract, that is the value of his expenditure and 10 per cent. thereon in addition. This 10 per cent. represents all the profits and other damages which he may have suffered, but he cannot claim more.

I would, therefore, allow the appeal with costs, cancel the lease, order a valuation of the said buildings and fixtures by arbitration in accordance with the said provisions of the lease, and condemn the

respondent to pay the amount found by the arbitrators, and ten per cent. in addition, unless both parties agree to accept $50,000, plus ten per cent., that is altogether $55,000, in full of all claims, with interest in either case from the 12th December, 1898, and all costs.

DAVIES J.—This was an action brought by the suppliant in the Exchequer Court against the Crown for damages because of the permanent withdrawal from his mill of certain water-power which the suppliant claimed to be entitled to under a lease from the Crown. The lease was made in 1871 for a term of years renewable in perpetuity for like terms subject at the termination of each term to a revision of the yearly rent, and demised a portion of the canal reserve on which the suppliant had erected a flour mill. With the lands demised was granted the use and enjoyment of so much of the *surplus water* of the canal as should be sufficient to drive four runs of ordinary mill-stones equal to ten horse-power for each run.

The lease contained several important clauses, providing for the stoppage of the supply of surplus water under specified circumstances relating to the navigation, repair, alteration or improvement of the canal by the Government, and that in such cases, if the stoppage was temporary, the lessee was neither to be entitled to abatement of his rent or compensation in damages, but that if the stoppage was total for

an uninterrupted period of six calendar months during the usual navigation season (the lessees were to be allowed) in full compensation for the same and for any loss or damage they may thereby sustain an abatement of six calendar months rent accruing *for any and every such period of continuous interruption.*

The lease contained another most important pro-

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vision stipulating that if at any time the Minister of Public Works determined that the leased lot of land and the surplus water or any part thereof were required for the use of the canal he could upon giving the lessee reasonable notice cancel the lease and pay the lessee the then value, with 10 per cent. added, of the buildings and fixtures thereon according to a value to be fixed by arbitration as provided.

No notice ever was given by the minister under this proviso and I agree with the judgment of the learned judge of the Exchequer Court that it cannot be invoked in this case.

The Government having determined upon some important changes and alterations in the canal system it became necessary to unwater that part of the canal from which the suppliant's mill received its supply of the surplus water.

As a consequence such supply ceased and was totally stopped for one or more seasons.

Under the terms of the lease this stoppage of water-power, though it resulted also in the stoppage of the mill and of suppliant's business there, was perfectly legal being in accordance with the express terms of the lease. Whether the total stoppage of surplus water lasted one entire season of navigation or several did not matter so long as it occurred *bonâ fide* and fairly from any of the causes or for any of the purposes and objects stipulated. It gave rise to no claim on suppliant's part for damages, but it entitled him to an abatement of his rent.

There came a time, however, when, as admitted by the counsel for the Crown, the total stoppage of water ceased to be justified under the provisions of the lease and the Crown became liable to the lessee for damages.

The trial judge awarded the suppliant $20,000 dam-

ages and in this judgment the Crown acquiesced by not appealing. The suppliant alone appealed and the question here is limited to the adequacy of the damages awarded. The contention on the part of the suppliant was that the judgment appealed from was wrong in excluding from the assessment of damages the claim made by the suppliant for the loss of profits in his business from the time of the unwatering till the time when he ought properly to have provided other means than the water provided, and also in allowing inadequate damages on the two other grounds of his claim, namely, the cost of installing new methods and providing the 40 horse-power and the excess in the cost of maintaining such new power.

I am of the opinion, for the reasons given by Burbidge J., that he was right under the circumstances in excluding the claim for profit submitted by the suppliant, and I am further of the opinion that there was an entire absence of any proper evidence on which damages under this head could have been assessed.

On the other two grounds I think the damages allowed were not only ample, but generous. The Crown has not appealed and I, therefore, say nothing more on that head.

I am of the opinion that where lands are injuriously affected by a public work or undertaking the proper measure of damages is the difference between the value of the lands or property affected before and after and as the result of the injury.

The difficulties of applying such a rule to the facts of this case are obvious. The supply of water granted by the lease was only the *surplus* water not required for canal purposes and the express stipulation for its total stoppage for entire seasons consecutive or otherwise, when improvements, alterations or repairs were

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being made in the canal system, without any right to damages and compensated for entirely by abatement in rent, rendered the application of the simple rule suggested by no means easy, and necessarily would leave very much to the discretionary judgment of the trial judge. The rule adopted by him was obviously one entirely in favour of the suppliant as it seemed to ignore the contingent nature of his right to the surplus water and treated such right as an absolute one, allowing him as damages what it would cost to install electric power equivalent to the horse-power which he was entitled to from the surplus water, and as if the later right was an absolute right.

At any rate the rule for measuring the damages adopted by the trial judge had not been objected to by the Crown, and as it was entirely in the suppliant's favour he did not object.

His objections were limited to the exclusion of the alleged business profits and to the inadequacy of the damages awarded on the other heads. His appeal is based upon these objections alone, and as I have shewn should fail on both.

The Crown not having appealed must be taken to be satisfied alike with the rules for measuring the damages adopted and with the result considering most probably that the learned judge in applying the rule be adopted did take into his consideration the contingent character of the suppliant's right to the surplus water.

Being of the opinion that the damages awarded were, to say the least, fully adequate, I think the appeal should be dismissed with costs.

IDINGTON J. (dissenting).—The appellant is assignee of a lease, renewable in perpetuity, from the

Crown, of certain land adjacent to the Williamsburg Canal. On this land there was and still is erected a flour-mill, which was driven by surplus water from the canal, and the lease gave the lessees the use of such water-power for that purpose.

The respondent, by his minister, for the purposes of improving the canal made such alterations as to deprive the appellant of the use of this water in the manner specified in the lease, and provided by the appliances, giving effective use of said water.

By the lease, as I interpret the same, it was provided that the Minister of Public Works could for the temporary purposes of repairs, improvements or alterations, enter and make same, without the lessee becoming entitled to abatement of rent, or compensation unless there should ensue a

> total stoppage of the said flow or supply of surplus water for and during an uninterrupted period of six calendar months during the usual navigation season.

In such event the lessee was to become entitled to be allowed in full compensation for such stoppage an abatement of

> six months' rent accruing for any and every such period of continuous interruption, in the flow or supply of surplus water.

In the course of the making of the alterations now in question, there was a change of plans that involved, in carrying the same into execution, a somewhat longer continuous total stoppage of water supply than this lease provided for, or made compensation for, in respect of the same.

There was a time, however, when it became quite apparent to every one concerned that the execution of the works, according to the plans finally adopted,

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would deprive the lessee for all time of the use of such water.

There was contained in the lease a provision anticipating some such event as a possible necessity.

That provision gave the Minister of Public Works the right, upon reasonable notice (not less than three months) to the lessee, to determine the lease, and thereupon pay the lessee the then value (with an addition of ten per cent. thereon) of all the buildings and fixtures that should be on said lands erected and belong to the lessee, according to a valuation to be made by arbitrators.

As the minister never availed himself of this power, that provision is out of the questions now to be considered.

It was contended that the minister's acts in the premises were each and all such as the "Expropriation Act" (52 Vict. ch. 13) entitled him to do, and gave a means of providing compensation for those damnified by such acts.

The express reservation in this lease of the right to determine the lease, and compensate the lessee, may have been intended to be in substitution of any such methods, and as the only means the Crown should have in the event of any such expropriation becoming necessary in the public interest.

Unless the case of *Saunby* v. *The Water Commissioners of the City of London* (1) is applicable to the "Expropriation Act," which I think doubtful, or the provision in question takes the case out of the Act, the case of *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Anderson* (2) would seem to indicate that the lessor and lessee here are in the same position as the parties there. It was sought there to raise an action

(1) [1906] A.C. 110. (2) [1898] 2 Ch. 394.

on the covenant for quiet enjoyment, and it failed because, though the covenant existed and but for the Act there relied on would have been broken, the company were within the power of the Act to expropriate, and compensation had to rest upon the Act.

The appellant from whatever causes seems to have yielded, so far, to the desires of the minister and his officers, and so far acquiesced therein, as to render their acts of such a character as probably to make the measure of damages substantially the same (save possibly in regard to the question of interest), whether assessed under the Act or for breach of the demise, and all implied therein.

The learned trial judge indicates his opinion to be that the "Expropriation Act" is applicable, but expressly says that he considers the result must be the same in treating the case as resting upon that Act or on breach of contract save as to interest and he allows that.

There can, therefore, be no reason to complain of any ill results from his holding, in this regard.

In suggesting these several questions, and pointing out the considerations they give rise to, I desire to be held as coming to no absolute conclusion on any of them. It is unnecessary just now. It may become necessary yet to consider them in different light from that now presented here.

When, however, the learned trial judge comes to assess the damages, he disposes of the matter as follows:

> I do not pretend to think that such damages can in any case be measured with any great precision or exactness. There is always room for considerable difference of opinion. But taking all the circumstances of the case into consideration, the change that was made from the first design of the work in question, the way that change came to be made, the object aimed at in making it, and the

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giving of a new lease of power to the suppliant for the purpose of manufacturing and selling electric power, the fair way to ascertain the damages would be, it seems to me, to take the cost of developing in that way two hundred horse-power and add thereto a reasonable profit, and then see at what annual cost the suppliant's mill might in that way be supplied with forty horse-power for the purpose of operating it. Then there should also be added an allowance sufficient to indemnify the suppliant for the cost of making any necessary changes in the machinery at his mill, and to cover the increased annual cost of operating the mill by electricity instead of by water-power. From the best consideration I have been able to give to the matter I have come to the conclusion that the sum of twenty thousand dollars ($20,000.00) paid to the suppliant in May, 1901, when the water in the basin above the weir was available for developing power, would have been a full indemnity and compensation for all damages to which he is in any way entitled in the premises.

It is to be observed that the parties had agreed that the learned trial judge should dispose of the entire damages and save future actions, if by any chance such might have existed in law, and that such possible actions would be barred thereby.

The consent appears on pages 215 and 216 of the case as follows:

> With reference to some statements made in the opening of the case as to the assessment of damages down to the date of the filing of the petition, and a declaration of the rights of the parties, counsel for both parties are now agreed that the damages should be assessed once and for all, you can add at the same time, not being agreed upon, the principle upon which they should be assessed, but that they are agreed that the damages should be assessed once and for all, and to be an end of the litigation in regard to the matter. That is what I understand to be the position of both parties now, and that is to be entered at the conclusion of the case. Then I think all we have said here need not be extended upon the notes unless you wish.

Keeping in view this consent and giving to it the widest operation, I am unable to adopt, as elements for consideration in assessing damages here, several factors which obviously enter into the consideration of the learned trial judge in arriving at the result I have just quoted.

The change that was made from the first design, the way the change came to be made, the object aimed at in making it, the giving of a new lease of power to the suppliant for the purpose of manufacturing and selling electric power, are all things that should have been left aside. The suppliant may or may not have acquiesced in and been a party to these changes of design and all else that I thus object to, and his acquiescence therein may be a fair matter for consideration when the court comes to deal with the delay in operating the mill and loss of profits by reason of such delay. It cannot enter into, and ought not have been made to appear as having entered into, the contemplation of the learned trial judge when assessing damages for the total deprivation of the forty horse-power the suppliant had a right under the lease to enjoy.

The giving of a new lease stands entirely as a separate transaction. It was conceded in argument that it could not be taken by operation of law to have superseded the rights under the old lease or to have created a surrender in law of the old lease.

Once it is conceded that these leases are independent transactions, each in force, I cannot comprehend how in law the giving or withholding, if it had been withheld, the second lease, could have anything to do with the assessment of damages for some invasion of the suppliant's rights under the first lease.

Having regard to what the learned judge had said, immediately before what I have quoted, it may be that these objectionable elements in truth did not enter into the results he arrived at in assessing the damages, further than to remove any impression of a high-handed wrong having been committed which might have under other circumstances been considered in the way of inflating the damages. However that may

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be it is unfortunate to have all these factors blended together in the unlimited way in which they are expressed in the paragraph I have just quoted.

Passing by these possible elements of error in the judgment appealed from, is the proper measure of damages for such a case as this

> to take the cost of developing, in the way the second lease provides, two hundred horse-power and adding thereto a reasonable profit, and then, etc.,

as above expressed?

If I am right in thinking that the two leases and the rights under each lease must be kept for the purpose of assessing damages on anything arising out of the old lease separate and entirely free from anything arising out of the granting of the second lease, the accidental or incidental result of the business relations of the parties concerned, apart from and having no relation to the first lease, ought, I submit with great respect, to have been rigorously excluded from any consideration.

I say ought to have been rigorously excluded, because in law and in fact they were entirely independent and separate transactions, and by reason of their proximity in point of time and place one is apt to allow the mind improperly to be affected in considering the one by considerations arising from what has taken place under the other, which in law must be excluded. But has there not been an entire misapprehension, not only on the part of the learned trial judge but also on the part of the litigants, in regard to the principles to be applied to measure the damages naturally flowing from the act of the respondent in depriving the suppliant permanently of the necessary water-power to drive his mill?

Is it not a case where the proper measure of damages is the diminished value of the property or of the plaintiff's interest in it, and not the sum which it would take to restore it to its original state?

It seems to me obviously pregnant with error to lay down any other rule. For, follow up the principle that has been applied, where are we to stop?

Some of the speculations of future possibilities were wide of the mark, but were in line of the principle contended for by the suppliant as the proper measure of his damages and in great part have been acceded to by the court below.

I may not, therefore, be right in giving him such consideration as I do in holding that an award of damages, based upon erroneous principles ought to be set aside.

There was no obligation on the part of the Crown to restore this mill or this water-power.

The water-power was destroyed, necessarily destroyed, as an accident in carrying out a public work. The execution of the work led to the deprivation, and in light of this lease the wrongful deprivation, of the plaintiff of his property, and the Crown was and is bound to answer for such damages as are the result of a diminution of the value of the property and just to the extent of that diminution in value. See *Jones* v. *Gooday*(1); *Hosking* v. *Phillips*(2); *Whitham* v. *Kershaw*(3); *Rolph* v. *Crouch*(4); *Child* v. *Stenning* (5).

So many misleading elements, leading to great misapprehensions of the actual damage done, are likely to arise from approaching the question on the basis of

(1) 8 M. & W. 146.
(2) 3 Ex. 168.
(3) 16 Q.B.D. 613.
(4) 37 L.J. Ex. 8.
(5) 11 Ch. D. 82.

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a restoration of power, that I think it ought to be discarded, and the simple question of the diminution of value be alone kept in view; however that may by the valuers be arrived at, but *never necessarily,* upon the basis of a new acquisition of power, equal to that lost by what has been done.

Those valuing should value as of the date when it became known to the appellant that he had lost forever the supply of power granted by the lease.

Of course, if the valuators think new power an element worth considering, the time to be taken for acquiring that will affect the valuation they place upon the property as it was at the time the power was off forever.

If the claim for damages should rest upon the "Expropriation Act," how the market value would be affected would be the test. See *Metropolitan Board of Works* v. *McCarthy*(1), at p. 253.

As to the time lost during the negotiations, it would seem as if the appellant had not pressed his claim in such a way as to indicate he had much right to complain.

It seems to me that this phase of the case has been so grouped with the other that it is quite impossible satisfactorily to indicate on this appeal what should be done in relation to any claim the appellant may have.

I am quite sure the provision in the lease for compensation for periods of six months' total stoppage may, indeed must, apply to successive periods of navigation seasons.

But when these come to be so joined together as to make one continuous period far exceeding the

(1) L.R. 7 H.L. 243.

period provided for, I doubt whether such a case has been covered by the provision.

The trouble I see here is that much of what was done and much of the time lost in running the mill was or may have been the result of agreement between the parties; as when the suppliant assented, relying upon what one of the officers of the department told him, and thereby an agreement was arrived at; or at another time the result of acquiescence, based upon the hopes, possibly founded upon the acts of such officers, or on the bare desires of the suppliant to acquire the other lease, and such desire restraining him from complaint, to such an extent as to justify the representatives of the Crown in assuming that he was satisfied, and so acquiescent as to forbid him making in future any claim for damages. In each of these cases there would be no damages allowed.

Then, was there ever a continuous period of total stoppage exceeding six months that was wholly free from complication with either of these two causes I have just adverted to?

If such there be found, and purely *in invitum* of the suppliant, on the part of the officers of the Crown, then so much of such a period as exceeded any such six months as I indicate, ought, I think, to be considered as giving a right to damages.

As to the measure of those, needless to say they must be based on what would be reasonable, and not on some of the extreme views put forward by the suppliant, based on what may have been an accidental run for forty lucky days.

I think the appeal should be allowed and the case go back for re-trial, or re-consideration.

1906

BEACH v. THE KING.

Maclennan J.

MACLENNAN J.—This is an appeal by the suppliant in a petition of right from a judgment of the Exchequer Court, and the ground of appeal is that the judgment fails to award him adequate damages for land injuriously affected by certain public works constructed by the Government of Canada.

Some question was made as to the nature of the claim, whether it rested upon covenant, or upon the statutory liability to compensation for land injuriously affected. I think it is clear that the claim must be rested upon the statutory liability. The lease contains a demise of a parcel of land and also of an easement of a certain supply of water, from a canal which is Crown property.

The Crown has taken no part of the demised land and has made no entry upon it. What it has done has been done upon the Crown's own land, the effect of which has been to destroy the easement which was demised. In such a case no notice or other formality is prescribed by the statutes in order to make the injurious act lawful, as was required in *Saunby* v. *The Water Commissioners of London*(1) lately before the Judicial Committee. If the destruction of the suppliant's easement had been wanton or unnecessary, or done otherwise than in the execution of a public work, or for the public use, or without statutory authority, then an action would have lain on the covenant for quiet enjoyment implied by law by reason of the use of the word *demise*. But the public statutes, having authorized the Crown to do what it did, made it lawful to commit a breach of its covenant, whereby the breach became innocent in law, and not actionable.

The claim of the suppliant must, therefore, be

(1) [1906] A.C. 110.

rested on the compensation provided by the statute, and that is a claim for injury to the suppliant's land, that is to his leasehold.

I agree with the learned judge's conclusion that until the 29th May, 1901, the cutting off of the water was temporary within the meaning of the lease; and for the injury before that day the provisions of the lease exempted the Crown from liability, except for six months during the season of navigation, and in that case limited it to six months' rent. On the day named the stoppage of the water became permanent, and on that day the injury to the suppliant's leasehold term became complete, and his right to compensation arose.

I think the learned judge was bound to assess the suppliant's damages just as he would have assessed them on that day. If on the following day the mill and machinery had been destroyed by fire or tempest, or if the adjacent river had overflowed its banks and had swept away, not only the suppliant's buildings, but the very land itself comprised in the lease, the suppliant's damages and compensation due from the Crown must have been the same.

That consideration at once excludes *profits,* as such, as an item of damage. The fact that the business carried on had been profitable, no doubt, is proper to be considered in comparing the value of the leasehold before and after the injury; but the question is how much less valuable the suppliant's property was after the injury, than it was before—for how much less would it sell in the market, having regard to the terms of the lease. *Ricket* v. *Metropolitan Railway Co.*(1); *Metropolitan Board of Works* v. *McCarthy*(2); Cripps on Compensation (5 ed.), 144-7.

(1) L.R. 2 H.L. 175.

(2) L.R. 7 H.L. 243.

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In determining that question, too, the proviso contained in the lease enabling the Crown to terminate the lease at any time, if the land or any part thereof should be required for the canal or any public purpose, on payment of the then value, with an addition of ten per cent., of all the buildings and fixtures thereon, belonging to the lessee, would be proper to be considered. The learned judge has found upon the evidence that the buildings and fixtures may be taken to have been worth $50,000 and that seems to be the fair effect of the evidence, therefore, the whole property was in effect by the terms of the lease under an option of purchase to the Crown for $50,000, plus ten per cent.

With that option held by the Crown and the liability to temporary interruption of the supply of water, practically without compensation, it may be a question for how much, if anything, more than $55,000, the property could have been sold, just before the permanent cutting off of the water.

Then how is the depreciation to be estimated?

I think the learned judge was bound to look at all the surrounding circumstances in order to come to a just conclusion. That the mill was not rendered permanently useless or valueless was clear enough. It could be operated by steam. The suppliant had done that for a year or more, not to its full capacity, it is true, but sufficiently to shew that operation in that way was possible. Then it could also be operated by electricity, and the necessary power for producing electricity was now available, and in the hands of the suppliant himself. The suppliant had a high opinion of the value of the new concession of power granted to him, five times as much as he had under the old lease, and while he desired and expected a much larger

amount of power, he was eager to accept the 400 horse-power which he received, and it is manifest that he had in mind using it for his mill. Of course he is not bound so to use it. Nevertheless its existence, and probable availability, would not be disregarded by any intending purchaser of the dis-watered mill.

Looking at all the circumstances, as stated in his very elaborate judgment, the learned judge came to the conclusion that the amount of damages proper to be awarded to the suppliant is the sum of $20,000, and he has awarded interest on that sum from the 29th May, 1901, the date on which the water was cut off permanently. The Crown does not appeal, and the question which we have to consider is whether or not the appellant has satisfied us by his evidence that a larger sum should have been awarded.

I have gone over the evidence both oral and documentary with great care, and I am unable to see any evidence on which we would be warranted in increasing the amount of the judgment.

I am of the opinion that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant: *J. Hilliard.*

Solicitors for the respondent: *Chrysler & Bethune.*